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Ontario Labour Relations Board HIGHLIGHTS

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January 2013

NOTICES TO THE COMMUNITY

PLEASE TAKE NOTICE that the following changes will be made to the Board's **Rules of Procedure** effective January 15, 2013.

Rules 25.3(f), 25.4(e), 26.3(f) and 26.3(m) will be changed to address the implementation of Information Bulletin 32 (Resolving Disputes in Displacement and Termination Applications in the Construction Industry during the Construction Open Period)

Rule 25.3(f) will require the applicant to provide "a copy of Information Bulletin No. 9 -- Status Disputes in Certification Applications in the Construction Industry, except for displacement applications made between February 1, 2013 and April 30, 2013 and triennially thereafter, then a copy of Information Bulletin No. 32—Resolving Disputes in Displacement and Termination Applications in the Construction Industry during the Construction Open Period." Rules 25.4(e), 26.3(f) and 26.3(m) will reflect the same requirement, with necessary modifications.

Rule 40.11 will be added to the Board's Rules:

The Board may order that the manner and scope of disclosing personal or financial information be restricted as the Board considers appropriate having regard to the circumstances of the case before it.

RULE 24.1(b) will be amended to remove the word "Priority" before "courier" to clarify the permissible methods for the delivery of construction industry certification applications.

Rule 16.2 will be amended so that an applicant may deliver his or her application before "or at the same time as" it is filed with the Board.

PLEASE ALSO TAKE NOTICE that the following Forms and Information Bulletins will be amended effective January 15, 2013 to comply with the amended Rules and to address the implementation of Information Bulletin 32:

Forms A-71; A-72; A-75; A- 77; A-81; C-32; C-34 Information Bulletins 6 & 7

NEW VICE CHAIR

The Board welcomes **Jesse Nyman** to the Board as a full-time Vice-Chair. Jesse received his law degree from the University of British Columbia in 2005 where he was the Gold Medalist and stood first in his class in second and third year. Jesse was a partner at CaleyWray Labour and Employment Lawyers where he regularly appeared before the Ontario Labour Relations Board on construction and non-construction matters, as well as other tribunals, boards and courts, including the Supreme Court of Canada.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of this year. These decisions will appear in the December/January issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Employer Support – Evidence – Practice and Procedure – Termination – The union sought

dismissal of the termination application alleging employer support – Two and one-half years after the application was filed and after almost all the evidence was entered, the union sought leave to recall B, one of the two employees who cast ballots in the vote, to testify in support of its 63(16) allegations, given new information B provided to union representatives – This information included alleged statements to B by the employer's manager that B had to join the union as a first step to filing an application to terminate the union's bargaining rights – The Board did not exercise its discretion to permit proposed amendments to the union's pleadings, given the failure of the union to exercise due diligence (it made no serious attempt to initially speak with B), the significant prejudice (fading of memories, death of the owner, litigation strategy) caused by this request, and the fact that the proceedings would be considerably lengthened since most witnesses would have to be recalled – The Board also held it would not permit the union to recall B since it seeks to recall a witness for the purpose of leading evidence concerning entirely new allegations of misconduct raised for the first time at the eleventh hour in circumstances where it failed to take any steps prior to the hearing to uncover those facts – This was not a situation where a party received material information it could not reasonably have been aware of through the exercise of due diligence – Matter continues

AON BUILDERS INC.; MICHAEL MITCHELL; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 0417-10-R Dated December 12, 2012; Panel: Caroline Rowan (12 pages)

Abandonment – Practice and Procedure – Unfair Labour Practice – The Board found it reasonable to infer from the fact that the applicant did nothing to advance this application for a period of four years and five months that the application was, at some point during such period of inactivity, abandoned by the applicant – Application dismissed

Arthur Coelho & Sons Masonry; Masonry Industry Employers' Council of Ontario and Ottawa Region Masonry Contractors Association; International Union of Bricklayers and Allied Craftsmen, Local 7 Arthur Coelho o/a Ottawa Masonry, 6468721 Canada, Inc. o/a CDO Masonry, and M.A.C. Maconnerie Masonry; File No. 3866-07-U; Dated December 12, 2012; Panel: Diane L. Gee (3 pages)

***Education Act* – Parties – *Prima Facie* motion – Unfair Labour Practice** – OSSTF brought a complaint against the Crown and Ministers of the Crown (including in their personal capacities) concerning the government issuance of a document for use at the Provincial Discussion Table (PDT), setting out the collective agreement results the government wished in the educational sector, including wage and grid freezes and changes to the ability to bank and cash out sick leave credits on retirement – The complaint alleged that the government's actions in making public statements with respect to its PDT positions constituted a failure to bargain in good faith and other breaches of the Act – The government took the position that the Crown was not bound by the Act (Crown immunity), the issues were not justiciable, and there was no *prima facie* case – The Board closely followed an earlier decision in *Ontario (Premier)* and dismissed the complaint pursuant to s. 4(2) of the Act, finding the Act does not bind the Crown and there was no point to any evidentiary hearing – Again following *Ontario (Premier)*, the Board did not find the government's role in the PDT process and in its efforts to build consensus or secure acquiescence on its political agenda to be a justiciable issue – Finally, the facts as alleged did not make out a case: the Crown was not the employer; the district school boards were – Nor was there anything pled to form the basis to conclude that the Crown was acting at the behest of the district school boards (assuming this to be possible given Crown immunity) – Application dismissed

Crown in Right of Ontario, the Honourable Mr. Dalton McGuinty, Premier of Ontario; the Honourable Ms. Laurel Broten, Minister of Education; the Honourable Mr. Dwight Duncan, Minister of Finance; Dalton McGuinty in his personal capacity; Laurel Broten in her personal capacity and Dwight Duncan in his personal capacity; Elementary Teachers' Federation of Ontario, Ontario Public School Boards' Association, Ontario Catholic School Trustees' Association and Canadian Union of Public Employees; File 0134-12-U; Dated December 11, 2012; Panel: Bernard Fishbein (34 pages)

Construction Industry Grievance – Evidence – Practice and Procedure – On a layoff/discharge grievance, the union made a preliminary objection to the admissibility of video surveillance evidence, and requested that the Board determine whether the test was "reasonableness" or "relevanc" – The Board noted the video surveillance evidence was of core probative relevance and was conducted on company premises during working hours – The Board was attracted to the approach that permitted the admissibility of the video surveillance evidence, but also contemplated submissions concerning any alleged

improper employer conduct, after the Board has a full appreciation of the entire dispute between the parties – Evidence admitted – Matter continues

Ellis Don Ltd.; Labourers' International Union of North America, Local 506; File 1255-12-G; Dated December 27, 2012; Panel: James Hayes; Roy O'Rourke; Alan Haward (3 Pages)

Health and Safety – Reprisal – Work Refusal – Correctional Officers continued to stage a work refusal after being advised by the Inspector that they did not have the right to refuse work – The circumstances of the dispute involved an outside call to the jail that a "zap-gun" (a "zip-gun" is a "home-made" weapon) was in the jail – In the end the management at the jail decided to implement a Level 2 search, while the correctional officers believed a Level 4 search was necessary – The union argued there was no work refusal, that neither the employer nor the inspector followed the requirements outlined in s. 43 and as a result the order could not stand – The Board first stated it was satisfied that a work refusal was engaged in when the manager was advised by one of the CO's that "we are shutting her down," and they stopped doing their rounds – The Board then noted that the main issue was whether the Inspector was correct in his decision that s. 43 did not apply in these circumstances – The Board reviewed the prior case law on the exemptions noting that the exemptions are important for the maintenance of the public's health and safety and for the health and safety of inmates housed in correctional facilities – The Board noted that none of the cases discuss the reasons for the exemptions in any detail, but that those exempted workers (firefighters, police officers, correctional officers) are charged with the protection of others and their jobs are inherently dangerous – If they refuse work, they are putting lives at risk – After reviewing the circumstances of home made jail weapons, the Board found that carrying out searches in inmate living areas and cells with the possibility that there might be a homemade weapon, including a homemade "gun," is a normal part of the correctional officer's job, as long as the searches have the appropriate equipment – The circumstances that existed at the jail at that time were inherent to the correctional officers' work – Accordingly, the appeal of the inspector's order was dismissed – Remaining matters referred to the parties

Hamilton-Wentworth Detention Centre; Chris Dowling; Steve Smith,; Doug Kariam, 0747-07-OH Jennifer Hollick; Tim Leroux, Melissa Nicholson,; Cheryl Dickson; George Tsiodoras; Jason MacLeod; Jason Gernhart; Beth Braun; File 0269-07-HS; 0747-07-OH; 1555-07-OH Panel: Brian McLean (28 Pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Pending
Defence Contract Management Agency Americas (Canada) Divisional Court No. 513/12	0955-11-R	Pending
Bur-Met Construction Divisional Court No. DC-12-010 **Thunder Bay**	3893-11-R	Pending
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	Pending
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	Pending
2130869 Ontario Ltd. Divisional Court No. 359/12	3518-11-R and 3519-11-G	Pending
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al (Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Pending
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 **Ottawa**	1056-11-R	Week of Jan 28/13
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	Pending
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894–09–G	January 18, 2013
Greater Essex County District S.B. Court of Appeal No. M41822	1004–08–M	Seeking leave
John McCredie v. OLRB et al Divisional Court No. 1890/11 **London**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473–08–U	December 7, 2012 Heard, reserved
Greater Essex Catholic District S.B. Supreme Court No. 34992	3122–04–G	Seeking leave to SCC

Case name & Court File No.	Board File No.	Status
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Supreme Court No. 34915	3322–03–R 2118–04–R	Seeking leave to appeal to SCC
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Blue Mountain Resorts v. MOL Court of Appeal No. C54427	1048–07–HS 0255–08–HS	September 27, 2012 Heard, reserved
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999–07–ES	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	Pending